Petition not printed

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Supreme Court of the United States

October Term, 1942.

No. 441.

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PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

DIANA BECK,
Petitioner (Defendant-Appellant Below).

MEMORANDUM OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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Statement.

The petitioner (defendant-appellant below), the proprietor of a beauty parlor in the Village of Brewster, State of New York, was found guilty in the Justice's Court of that village of violating §564, subdivision 2 of Article 19 of the Labor Law of the State of New York. That section of Article 19, set out in full in Appendix "A" to this Memorandum, provides that an employer who pays any woman or minor employee less than the rates applicable under a mandatory minimum wage order shall be guilty of a misdemeanor. Petitioner failed to pay a woman employee the rates prescribed by Mandatory Order No. 2, the wage order

promulgated by the Industrial Commissioner of the State of New York to govern wages in beauty occupations (Appendix "B").

The judgment of conviction was affirmed by the County Court of Putnam County, State of New York, on September 22, 1941 (R. 14-23).* Associate Judge Finch of the Court of Appeals of the State of New York granted leave to appeal to that Court directly from the County Court on questions of Law (R. 10-13). The Court of Appeals affirmed the conviction in a decision rendered without opinion, on April 24, 1942. Subsequently the remittitur of the Court of Appeals to the County Court of Putnam was amended three times by orders of the Court of Appeals of June 4, 1942, June 15, 1942 and October 27, 1942, respectively. The remittitur of the Court of Appeals was last amended to read as follows:

> "Judgment affirmed.
>
> The defendant argued (1) that Article 19 of the Labor Law of the State of New York is violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States; and (2) that Sections 110, 111 and 112 of said Labor Law, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States. This court held that said Article 19 of the Labor Law of the State of New York, and Sections 110, 111 and 112 of said Labor Law are not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States."

Opinions of the Courts Below.

The opinion of the County Court of Putnam is found at pages 5-8 of the Record before the Court of Appeals (R. 14-

* This and other such references are to folios of the Record before the Court of Appeals.

23). The original decision of the Court of Appeals, without opinion, is reported at 288 N. Y. (Mem.) 93.

Jurisdiction.

Jurisdiction of this Court is claimed under §237(b) of the Judicial Code, as amended [U. S. C. A. Title 28; §344 (b)]. Furthermore, respondent respectfully calls to the attention of this Court Rule 38(5) of the Supreme Court Rules indicating the criteria for use of the Court's discretion in passing upon petitions for writs of certiorari.

Questions Presented.

1. Does Article 19 of the Labor Law of New York State violate the Fourteenth Amendment of the Federal Constitution?

2. Does §564(2), in particular, providing penalties for failure to comply with mandatory minimum wage orders, offend the Fourteenth Amendment of the Federal Constitution?

3. Is the exclusive procedure in the New York State Labor Law for review of the reasonableness of minimum wage orders repugnant to the Fourteenth Amendment of the Federal Constitution?

Summary of Argument.

1. Petitioner contends Article 19 of the New York State Labor Law is invalid in ~~two~~ three respects: (a) it is contended that the public policy enunciated therein transcends State police powers; (b) it is argued that said Article is an

invalid delegation of powers under the State Constitution; and (c) that the administrative officials are given "arbitrary" powers. The decision of this Court in *West Coast Hotel Company v. Parrish*, 300 U. S. 379, sustaining similar legislation of the State of Washington, furnishes a complete answer to the first objection (a). The second contention (b) that authority has not been delegated to the Industrial Commissioner by the State Legislature under Article 19 in conformity with the State Constitution, presents no Federal question for review by this Court. The argument that the delegation of such authority is "arbitrary" (c) and thereby repugnant to the Federal Constitution is entirely lacking in merit.

2. Petitioner contends that §564, subdivision 2 of Article 19 of the Labor Law "confers upon the Commissioner of Labor, legislative power to declare and fully define a crime and is a violation of Article III, Section 1, of the Constitution of the State of New York", and the Fourteenth Amendment of the Federal Constitution. Petitioner's premise that the Industrial Commissioner may define a crime is false. In any event the objection to the mode of delegation of powers under the State Constitution presents no Federal question. Nor is there any merit to the further suggestion that the definition of a crime in §564, subdivision 2 is too vague and uncertain to satisfy due process of law.

3. Petitioner challenges the validity, under the Federal Constitution, of the exclusive method of procedure prescribed by the New York State Labor Law for testing the reasonableness of minimum wage orders. Petitioner's rights are adequately protected by the procedure contested herein. In the light of prior decisions of this Court and

well settled administrative and constitutional law doctrine the requirements of "due process of law" under the Fourteenth Amendment are fully complied with by the Labor Law, and petitioner does not present a substantial Federal question in attacking said law.

Because petitioner failed to follow the prescribed exclusive procedure the questions of reasonableness of Mandatory Order No. 2, dealt with in petitioner's supporting brief, are not in issue.* The remittitur of the Court of Appeals as finally amended and quoted above indicates that such questions were not passed upon below.

Statutes.

Article 19 and §§110, 111 and 112 of the Labor Law are set out in full in Appendix "A" to this Memorandum.

ARGUMENT.

POINT I.

The decision of the New York State Court of Appeals herein, sustaining Article 19 of the Labor Law, is in accord with the decision of this Court in West Coast Hotel Company v. Parrish.

This Court, in 1936, declared invalid the New York State Minimum Wage Law for women and minors enacted in 1933 (Laws of 1933, Chapter 584; Article 19 of the Labor Law). *Morehead v. New York ex rel. Tipaldo,* 298 U. S. 587. The decision was based upon the authority of the earlier holding of this Court in *Adkins v. Children's Hos-*

* These are the issues involving "guaranteed wages", "apprentices", and "tips".

pital, 261 U. S. 525 (1923). In 1937, in the case of *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, this Court finally swept aside the above decisions, expressly overruling the *Adkins* case. In the *West Coast Hotel* case the minimum wage law for women and minors of the State of Washington was upheld.

Announcement of the latter decision was the cue for the New York State Legislature to enact a new wage law closely paralleling in every essential detail the Washington Statute (Laws of 1937, Chapter 276; Article 19 of the present Labor Law). It is that law which petitioner asks this Court to review.

Petitioner attacks the underlying policy of Article 19 of the New York State Labor Law stated in §551 as follows:

> "It is the declared public policy of the state of New York that women and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health."

The same challenge has already been met in the case of *West Coast Hotel Co. v. Parrish.* The realization that inadequate wages exerted a pernicious effect on the health of women and minors prompted the Legislature of the State of Washington to enact the Statute upheld in that case (300 U. S. 379, 386-7).

In addition to persistent rattling of the bones of the *Adkins* case, petitioner speaks vaguely of a "new broad policy" allegedly fatal to the New York statute. This contention seems to be based upon the recognition in §550 that the welfare of women and minor employees is related to the "public interest of the community at large in their health and well-being, as well as for the protection of trade and industry." Obviously the regulation herein as well as that

sustained in the *West Coast Hotel* case is a valid exercise of State police powers for the precise reason that it has been "adopted in the interests of the community" (300 U. S. 379, 391, 399).

Petitioner's challenge to the validity of Article 19 of the Labor Law of this State relates principally to the delegation of legislative powers to the Industrial Commissioner. It is asserted in this regard that the Legislature failed to comply with Article III, §1 of the New York State Constitution (Petitioner's Brief, page 1A). The implicit holding of the Court of Appeals that authority has been properly delegated to administrative officials by Article 19 in conformity with the State Constitution presents no federal question for review by this Court.

Neblett v. Carpenter, 305 U. S. 297, 302, rehearing denied, 305 U. S. 675;
Ohio v. Akron Park District, 281 U. S. 74, 79;
Welch v. Swasey, 214 U. S. 91, 104.

Apart from the question of delegation of powers petitioner alleges that various sections of Article 19 violate the due process clause of the Fourteenth Amendment of the Federal Constitution. The basis for this contention is not entirely clear. Generally petitioner appears to object that the Industrial Commissioner and wage boards have been given excessive, discretionary, and arbitrary powers. A cursory examination of the structure of Article 19 is sufficient to demonstrate the lack of merit in petitioner's claim.

In establishing minimum wage rates three factors are to be taken into account by the administrative officers (§555):

"the amount sufficient to provide adequate maintenance and to protect health";

"the value of the service or class of service rendered"; and

"the wages paid in the state for work of like or comparable character".

In this respect the New York statute is even more explicit and restrictive than the Washington statute upheld in the *West Coast Hotel* case. In the Washington Statute only the factor of adequate maintenance costs was expressed. The factor of value of services rendered was supplied by implication (300 U. S. 379, 396).

In other respects Article 19 is constructed along the lines of the Washington statute and the Federal Fair Labor Standards Act which won the stamp of approval of this Court in the *West Coast Hotel* case (300 U. S. 379, 387) and in the case of *Opp. Cotton Mills, Inc. v. Administrator* (312 U. S. 126) respectively. In fact the Court noted that the latter Act was modelled upon the New York State statute.

Article 19 has been designed to encourage careful and scientific preparation and deliberation and to preclude "arbitrary" action by the officials charged with the formulation of the wage rates. Facts and statistics compiled by the investigating staff of the Industrial Commissioner relevant to a particular occupation are placed before an independent wage board consisting of representatives of employers, employees, and members of the public experienced in and conversant with the occupation (§§554, 556). The wage board is given subpoena powers and may summon its own witnesses (§556). Rates recommended by the wage board must not exceed costs of adequate maintenance (§556, subd. 5). The Industrial Commissioner may suggest subsidiary regulations but any basic wage rates must be finally evolved by a wage board (§557).

It is presumed that the Industrial Commissioner and the members of the wage boards will discharge their duties honestly, will faithfully apply the criteria expressed in Article 19 in formulating wage orders, and will not act arbitrarily. *New York ex rel. Lieberman v. Van de Carr,* 199 U. S. 552.

The fact that in various sections of Article 19 the word "may"—permissive in its popular sense—is used instead of the word "must" does not invalidate our law. The legislative history of Article 19 clearly reveals an intent to require application of the defined criteria by those entrusted with the task of formulating wage rates. If the word "may", although permissive in its literal sense, must be given a technical mandatory construction in order to fulfill constitutional requirements, then the Court of Appeals inferentially gave the word just such a construction. And the Court of Appeals would have complied with uniformly accepted canons of statutory interpretation in so doing.

Crawford, *The Construction of Statutes* (1940), §§261, 266.

People v. DeRenna, 166 Misc. (N. Y.) 582 (and see authorities collected therein).

People ex rel. Conway v. Supervisors, 68 N. Y. 114, 119.

POINT II.

Section 564, Subdivision 2, of the Labor Law does not confer upon the Industrial Commissioner the power to declare and define a crime.

Petitioner contends that §564(2) confers upon the Industrial Commissioner the power to define a crime, and

that it is thereby unconstitutional as (1) an improper delegation of legislative power under the New York State Constitution (Art. III, §1) and (2) violates the Fourteenth Amendment of the Federal Constitution.

Section 564(2) provides that an employer who pays less than the rates prescribed by a mandatory wage order "shall be guilty of a misdemeanor", and subject to certain penalties upon conviction. Thus the statute itself, and not the mandatory order promulgated by the Industrial Commissioner, creates the misdemeanor. Petitioner has failed to grasp the distinction drawn by the New York and Federal Courts between (a) a grant of authority to a public officer or administrator to determine which, if any, of his regulations shall be deemed a crime *(People v. Ryan,* 267 N. Y. 133), and (2) statutes like §564(2) where the Legislature validly delegates to the administrator power to make rates or regulations *and* further provides that a violation of any and all of such rates or regulations properly promulgated shall be punished as provided by law.

United States v. Grimaud, 220 U. S. 506;
Darweger v. Staats, 267 N. Y. 290, 306.

In any event, as pointed out above in this Memorandum the question of the propriety of a delegation of powers by the Legislature under a State Constitution presents no Federal question for review by this Court.

Petitioner interposes a separate objection in the allegation that §564(2) is "vague and indefinite" (Petitioner's Brief, page 23) and thereby violates the due process clause of the Fourteenth Amendment of the Federal Constitution. The "applicable rates" to which §564(2) has reference, in defining the misdemeanor, are those fixed by the mandatory

order, in this case Mandatory Order No. 2. Petitioner does not concede a total lack of understanding of the text and purport of Mandatory Order No. 2. Surely, then, §564(2), read in connection with a particular mandatory order, is sufficiently explicit and informative to meet the requirements of due process of law enunciated in the authorities cited by petitioner. *Whitney v. California*, 274 U. S. 357, 368; *Connally v. General Construction Co.*, 269 U. S. 385.

POINT III.

The exclusive procedure in the Labor Law for review of the reasonableness of minimum wage orders is not repugnant to the Fourteenth Amendment of the Federal Constitution.

The Court of Appeals upheld §§110, 111, 112 and 562 of the Labor Law prescribing an exclusive remedy for those who feel themselves aggrieved by a wage order. Consequently the Court of Appeals refused to pass upon the question of the validity of Mandatory Order No. 2 in this criminal proceeding. But respondent has never contended—as petitioner intimates—that the courts in a criminal prosecution are precluded from passing upon the validity of Article 19. That article was in fact reviewed and sustained by the Court of Appeals herein.

Section 562 of the Labor Law provides with respect to review of wage orders:

> "All questions of fact arising under this article except as otherwise herein provided shall be decided by the commissioner and there shall be no appeal from his decision on any such question of fact, but there shall be a right of review by the board of standards and appeals and the courts as provided in article three

of this chapter from any ruling or holding on any question of law included or embodied in any decision or order."*

This section must be read together with the procedural requirement of Article III. Section 110 (1) reads:

"1. Any person in interest or his duly authorized agent may petition the board of standards and appeals for a review of the validity or reasonableness of any rule or order made under the provisions of this chapter.

"2. * * * The filing of such petition shall operate to stay all proceedings under such rule or order until the determination of such review."

Court review of the "validity or reasonableness" of an order of the Industrial Commissioner was expressly confined to the New York State Supreme Court, but only after proper resort to the administrative agency (§ 111).

Section 112 (1) precisely expresses the Legislature's desire to prevent any Court from passing upon the validity of a wage order other than the Supreme Court pursuant to the above sections. The section reads:

"Every provision of this chapter and of the rules made in pursuance thereof, and every order directing compliance therewith, *shall be valid unless declared invalid in a proceeding brought under the provisions of section one hundred and ten. Except as provided in section one hundred and eleven, no court shall have jurisdiction to review or annul any such provision or order or to restrain or interfere with its enforcement.*" (Italics supplied.)

Application of the above scheme has not deprived petitioner of any constitutional rights.

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* An amendment to § 562, effective after the commencement of the prosecution herein, provided for appeal directly to the Appellate Division of the Supreme Court from decisions of the Board. L. 1942, c. 693, eff. May 6. 1942.

The rationale of the firmly established principle that the legislative branch of government will not violate the requirements of "due process of law" by confining remedies to a prescribed procedure such as found in Article III has been summed up by former Chief Justice Hughes of the United States Supreme Court:

> "* * * the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right. Nor does the requirement of recourse to administrative procedure establish invalidity if legal rights are still suitably protected."
>
> *Anniston Manufacturing Co. v. Davis,* 301 U. S. 337, 343 (1937).
>
> [And see *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50 (1938);
>
> *Lewis v. City of Lockport,* 276 N. Y. 336, 343 (1938).]

The fact that the individual contesting the administrative order has been called before the criminal bar does not alter the application of the principle. If "suitably protected", his duty to resort to the administrative procedure may not be avoided. The defendant in this prosecution may look to section 112 (2) of Article III for ample protection. That section provides as follows:

> "Every such provision, rule or order shall in a prosecution or action to impose a penalty for its violation be deemed valid unless prior thereto such provision, rule or order has been revoked or modified by the board or annulled by a court pursuant to sections one hundred and ten and one hundred and eleven, or unless such proceeding is pending, *in which case the prosecution or action shall be stayed by the court pending the final determination thereof."* (Italics supplied.)

This stay of prosecution operates automatically *(Scheier v. Mitchell,* 188 App. Div. 182, 1st Dept., 1919).

The New York State Courts have upheld similar exclusive administrative procedures restricting rights of review in criminal proceedings.

People v. Calvar Corporation, 286 N. Y. 419;
People v. Ludwig, 262 App. Div. 912.

In two cases argued before this Court parties threatened with statutory penalties (*St. Louis, etc. Ry. Co. v. Alabama Public Service Commission*, 279 U. S. 560, 563), and deportation (*United States v. Sing Tuck*, 194 U. S. 161), both in the nature of criminal penalties, were denied affirmative judicial relief in the absence of prior resort to prescribed administrative remedies.

Petitioner has alluded vaguely to a requirement of due process of law that administrative agencies prepare "findings". Minimum wage orders promulgated under Article 19 applicable generally to an entire industry are "clearly legislative in character".

Benjamin, *Report on Administrative Adjudication in the State of New York* (1942), pp. 203-4.

Administrative regulations in that category need not be accompanied by formal "findings" as in the case of determinations by "quasi-judicial" agencies.

Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186.

In any event there is no element of surprise to frustrate those seeking to review wage orders under the New York Labor Law. Recommendations of wage boards upon which rates are ultimately predicated are published. Petitioners before the Board of Standards and Appeals have free access to factual material compiled by the Industrial Commissioner and submitted originally to the wage boards. Furthermore the Board customarily renders full opinions

explaining its decisions in order to facilitate judicial review therefrom.

Petitioner alleges the above procedure is repugnant to the Fourteenth Amendment on the ground that § 562 precludes appeal from decisions of the Industrial Commissioner on questions of fact. Statutes giving finality to decisions of administrative officials need not violate due process of law.

Int. Com. Comm. v. Union Pacific R. R., 222 U. S. 541, 543.

Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199, aff'd 284 U. S. 594.

Gudmunson v. Cardillo, 126 F. (2d) 521, 524.

Constitutional demands will be satisfied if, in attacking regulations of a "legislative" character such as wage orders under Article 19, the complainant is permitted a hearing at some stage or other in a review proceeding. The New York State Labor Law affords two opportunities for those challenging wage orders to be heard: public hearings conducted by the Industrial Commissioner before a wage order is made directory (§ 557), or mandatory (§ 559), or before any regulations are modified (§ 561); and the privilege of a second hearing before the Board of Standards and Appeals is provided for review of wage orders when promulgated. Interested parties are given complete freedom in introducing factual evidence at the public hearings. And in a proceeding before the Board of Standards and Appeals petitioners may

> "challenge the facts on which the minimum wage order rests, and may introduce controverting evidence. But if that is done, the issue before the Board is not an original issue as to the correctness, in the Board's judgment, of the facts asserted as the basis of the quasi-

legislative action; it is, rather, an issue of law (similar to that in judicial proceedings challenging the validity of legislation under the due process clause) whether there is rational foundation for the quasi-legislative action."

Benjamin, *supra*, p. 204.

Pacific States Box & Basket Co. v. White, 296 U. S. 176.

Respondent respectfully submits that petitioner has failed to present a substantial Federal question for review by this Court and asks that the petition for a writ of certiorari be denied.

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